IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.810 OF 2003

1. Mr.Mamya @ Mohammad Rafiq]
Said Issamuddin Sayyad,]
Age 20 years]
Indian Inhabitant, Occ:]
Private Service,]
Residing at Pagdula Bldg.]
Ground floor, Room No.4,]
II Rabodi, Thane (W)]
Dist.Thane.]
]
2. Mr.Karim Maheboob Shera,]
Age 20 yrs. Occ: Private]
service, Indian Inhabitant]
Residing at Krantinagar]
Galli No.15, Own house II]
Rabodi, Thane (W),]
Dist.Thane.]
]
3. Mr.Anwar Babu Shaikh]
Age 23 yrs. Occ:Business]
Indian Inhabitant,]
Residing at Krantinagar]
Galli No.13, Own House,]
Rabodi II, Thane (W)]
Dist.Thane.]..Appellants
Presently in Thane Central Jail]

Vs.

The State of Maharashtra]..Respondent

...

None for the Appellants
Mr.M.S.Mhambre AGP for -Respondent-State

...

CORAM: R.M.S.KHANDEPARKAR, AND
SMT.V.K.TAHILRAMANI, JJ.
DATE : JULY 02/03, 2007

ORAL JUDGMENT [PER SMT.V.K.TAHILRAMANI,J.]:

1. Through this appeal, the appellants i.e. original accused Nos. 3 and 4 have challenged the judgment and order dated 25.4.2003 passed by the learned Additional Sessions Judge, Thane in Sessions Case No. 2 of 1999 and Sessions Case No. 118 of 2000. By the said judgment and order, the learned Sessions Judge convicted the appellants under Section 302 r.w. 34 of IPC, Section 324 r.w. 34 of IPC and Section 25(i)(b) of the Indian Arms Act. For the offence under Section 302 r.w. 34 of IPC, each of the appellants was sentenced to imprisonment for life and fine of Rs.1000/- i/d R.I. for six months. For the offence under Sections 324 r.w. 34 of IPC and under Section 25(i)(b) of the Arms Act, each of the appellants was sentenced to imprisonment for one year and fine of Rs.1000/- i/d R.I. for six months. The learned Sessions Judge directed all the substantive sentences to run concurrently.

2. The prosecution case briefly stated is as under:

. The complainant P.W.1 Shakila was residing along with her husband Anis (deceased) at Krantinagar,

galli No.13, Rabodi-II, Thane. Her mother in law P.W.8 Ashabi along with P.W.7 Samir i.e. brother of her husband Anis (deceased), were residing at Rabodi-I near Tabela Khan Manzil, Thane. On 18.4.1998 at about 9 p.m. one Bablu had demanded Rs.20/- from Faiyaz i.e. brother of deceased Anis for Ganja. As Faiyaz refused to pay the amount, there was quarrel, in which, Faiyaz came to be assaulted. Thereafter, on the next day i.e. on 19.4.1998 at about 10 p.m. when the complainant P.W.1 Shakila was in her house, at that time, the accused persons along with two others i.e. Bablu and Anis came to her house and they started enquiring about her husband. On being told Anis was not there, they went away. When they returned, they stated that now they will finish her husband. At that time, Anis the husband of complainant was returning back from work. These accused persons assaulted him by sword and cricket stumps. It is the case of the complainant that when she went to intervene, she was also beaten. Her FIR came to be recorded. Thereafter, investigation commenced. After completion of investigation, charge-sheet came to be filed. In due course, the case was committed to the Court of Sessions.

3. Charge came to be framed against the appellants under Sections 25(1)(d).. of the Arms Act and under Sections 143, 148, 149, 149 r.w. 302 of IPC and under Sections 326, 323, 504 and 506 of IPC. Charge also came to be framed in the alternative for the offence under Section 302 r.w. 34, 326 r.w. 34, 323 r.w. 34, 504 r.w. 34 and 506 r.w. 34 of IPC. After perusing the evidence which was led during the trial, the learned Sessions Judge convicted and sentenced the appellants as stated in para no.1 above. Hence, this appeal.

4. We have heard the learned APP and perused the evidence of the witnesses and the entire record pertaining to the present case. None appears for the appellants-original accused. In view of the decision of the Supreme Court in the case of **Bani Singh and others V. State of U.P.; 1996 CRI L.J.3491,** we have examined the entire record and we are disposing of this appeal on merits.

5. The prosecution case is mainly based on three eye witnesses i.e. P.W.1 Shakila who is the complainant, P.W.7 Samir who is an injured witness

and P.W.8 Ashabi who is the mother of deceased Anis. It may be stated here that as far as recovery from any of the accused persons is concerned, the pancha witnesses have turned hostile. No doubt, the Investigating Officer P.W.13 P.S.I. Nikam has deposed about recovery at the instance of the accused persons, however, we are of the opinion that his evidence cannot be relied upon on the aspect of recovery as he has stated that he does not remember which accused produced which weapons. It is also interesting to note that in this case, the C.A. report shows that there were blood stains on some articles, the blood group of the stains is inconclusive. Moreover, none of the articles mentioned in the C.A. report bear any exhibit number, in such case, it is impossible to tally as to which article had blood stains and which articles did not have blood stains. Such a C.A. report is of no use to the prosecution case. In this view of the matter, it is seen that the only material against the appellants is the evidence of the above three witnesses i.e. P.W.1 Shakila, P.W.7 Samir and P.W.8 Ashabi. We shall now proceed to deal with the evidence of these three eye witnesses.

6. The first eye witness is P.W.1 Shakila who was the wife of deceased Anish Shaikh. P.W.1 Shakila in her examination in chief, has stated that accused nos.1 to 3, Bablu and Anish came to her house. They were referring to her husband Anish Shaikh and saying that "they will finish him." She has thereafter stated that appellant no.2-Karim assaulted her husband with sword and other persons beat her husband with hockey sticks. When she intervened, she was given a blow on the back by accused-Karim who was armed with sword. However, on perusal of the cross examination of this witness, we do not find her evidence to be credible and trustworthy. This is so on account of a number of omissions which have been brought out in the cross-examination of this witness. In the cross-examination Shakila has stated thus: "I had not stated to the police that my husband was beaten by hockey sticks. I had stated to the police that accused had beaten my husband on head. I had stated to police that deceased accused Anish had given blow to me on the backside portion of right ear. I cannot give any reason why it is not mentioned in my complaint". She has further stated

in her cross examination that she cannot give any reason why it is mentioned in her complaint that she was beaten by Karim on her back. Thus there are number of omissions in her evidence and hence, we do not find it safe to rely upon her evidence.

7. The second eye witness is P.W.7 Samir Shaikh. This witness has stated that he had gone to his brother's house to see T.V.. When he came out of the house, he saw Anish, Bablu, Anwar (appellant No.3) and Karim (appellant No.4). He was hit by brick and he became unconscious. After gaining consciousness, he went to his house. He saw his brother lying in an injured condition and his wife told him that his brother has been beaten by Anis, Karim, Bablu and Anwar. In the cross-examination, it has been brought out that the above statements of this witness are omissions. As far as this witness is concerned, it is pertinent to note that thereafter in his examination in chief, he has stated that ''if I would have stated that as soon as I came out of the house of my brother, I was hit with bricks, the contents to that effect which are appearing in my statement are not correct. If it is in my statement that on 19.4.98 at about 9.30

p.m. I started from my house to the house of my brother Anis at about 9.45 and left immediately. If it is appearing in my statement then it is incorrect. I was not beaten near the house of my brother. Whatever, I stated in chief that after I came out of the house, I was beaten by brick, is not correct. I had stated that I had seen Anis, Bablu, Anwar and Karim, the name of Karim is not in my statement". This witness has admitted that the name of Karim as well as name of Anwar is not there in his statement. This witness has only spoken about the assault on him. He has not witnessed the assault on Anis. Even as far as assault on this witness himself is concerned, looking to the above evidence, we do not find his evidence credible and reliable.

8. The last eye witness in the present case is P.W.8 Ashabi. Ashabi is the mother of deceased Anis. Ashabi has stated that when she stepped into the galli, she heard commotion. She saw that Anis and Karim were armed with swords. The other accused i.e Mamya and Bablu were armed with stumps. She has stated that the blows of swords were given on the hands and head of Anis. As far as the

version of this witness is concerned, the post mortem notes relating to Anis do not show any injuries on the hands of Anis. There is no injury on the hands of Anis either by sword or any injury which could have been caused even by cricket stumps.

9. P.W.6 Dr.More has stated that he conducted post-mortem of the dead body of Anis and on external examination he found following injuries:

1) Abrasive contusions forehead 4 x 1 cm.

2) stitched wound occipital region, two in number 4 x 3 cms. each scalp deep on opening the fracture of occipital bone.

3) Abrasion contusion linear, left shoulder joint 3 x .5 cm.

4) Abrasive contusions linear 4 x .5 cms. right shoulder joint.

5) Contusions on upper lip 4 x 2 cms.

. In his cross examination, P.W.6 Dr. More has stated that these injuries are possible if person falls from a height on the ground which is having hard and blunt surface. We have already observed that we do not find the evidence of P.W.1 Shakila and P.W.7 Samir to be reliable and trustworthy, in such case, with regard to the evidence of P.W.8 Ashabi, looking to the discrepancies between the evidence of Ashabi and the medical evidence on record, we do not find it safe to rely upon sole testimony of Ashabi.

10. It may also be borne in mind that all the three witnesses are interested witnesses. Though the incident had occurred in a busy locality and there were chawls on both the sides, no independent witness has been examined and only three witnesses who are interested witnesses, have been examined. All these witnesses had enmity with the accused persons on account of the incident which had occurred on the earlier day i.e. on 18.4.1998 wherein Faiyaz who is the son of Ashabi (P.W.8), brother of Samir (P.W.7) and brother in law of Shakila (P.W.1), had been assaulted by the accused persons. Looking to all these facts, and the

evidence of the three eye witnesses, we find it difficult to place implicit reliance on the evidence of these three witnesses.

11. In the result, appeal is allowed. Judgment and Order dated 25.4.2003 delivered by Additional Sessions Judge, Thane in Sessions Case Nos.2 of 1999 and Sessions Case No.118 of 2000 convicting appellants for the offence punishable under Sections 302, 324 r.w. 34 of IPC and 25(i)(b) of the Arms Act, is set aside. The appellants are acquitted of the said charges. Appellants Nos.2 and 3 are on bail. Their bail bonds shall stand cancelled. The appellant no.1-Mamya @ Mohamad Rafik Sd.Issamuddin Syyed shall be released forthwith if not required in any other case. Fine amount if paid, shall be refunded to the appellants.

12. Appeal allowed.

[R.M.S.KHANDEPARKAR, J.]

[SMT.V.K.TAHILRAMANI,J.]